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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 691

WILLIAM M. BROWN, PETITIONER

v.

KENNETH C. ROYALL,[1] SECRETARY OF THE ARMY, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 96-99) is reported at 81 F. Supp. 767. The Court of Appeals for the District of Columbia Circuit wrote no opinion, simply entering an order granting the respondents' motion to affirm (R. 113).

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[1] Kenneth C. Royall resigned as Secretary of the Army on April 27, 1949. His successor does not appear to have been substituted within the six months allowed by Rule 25(d) of the Federal Rules of Civil Procedure.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court's order of dismissal was entered on October 13, 1949 (R. 113). A motion for reconsideration of this order, filed October 28, 1949, was denied on January 12, 1950 (R. 114, 117). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's allegations, that the preliminary procedures specified by the 70th Article of War were not complied with, that he was denied adequate opportunity to prepare his defense, and that his case was not prosecuted promptly, were properly held insufficient as a basis for setting aside petitioner's court-martial conviction in this declaratory judgment action.

STATUTE INVOLVED

Article of War 70 (Act of June 4, 1920, c. 227, subch. II, § 1, Art. 70, 41 Stat. 759, 802, as amended by the Act of August 20, 1937, c. 716, § 2, 50 Stat. 724, 10 U.S.C., 1946 ed., 1542), as it read at all times relevant hereto, provided: [2]

> Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of,

[2] Effective as of February 1, 1949, most of the provisions of Article of War 70 were removed and (with two amendments) renumbered as Article of War 46a, Article of War 46b, Article of War 46c, and Article of War 47b. Act of June 24,

or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay

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1948, c. 625, Title II, §§ 222, 231, 244. All that now remains of Article of War 70 as it formerly stood is the first two sentences of the fourth paragraph.

It is clear, however, that the former Article of War 70 governs this case.

in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

STATEMENT

On February 18 and 19, 1946, petitioner was tried by a general court-martial in Heidelberg, Germany, on charges that he had, while serving as a military government officer in Weimar, Germany (1) appropriated and converted certain captured German currency and bonds belonging to the United States, (2) engaged in illegal currency transactions, and (3) wrongfully warned a civilian to leave town to avoid arrest by military government authorities (R. 18-20). Finding him guilty

as charged (except for the finding that he had appropriated 30,000 rather than 96,000 Reichsmarks), the court-martial sentenced petitioner to be dismissed from the service, to forfeit pay and allowances due and to become due, and to be confined for one year (R. 20). After the sentence had been reviewed and approved by the Commanding General of the Seventh Army, the Board of Review, the Judge Advocate General, and the Under Secretary of War,[3] petitioner was confined for three months at a branch of the United States Disciplinary Barracks (R. 21-22, 8).

Some time after his release from confinement,[4] petitioner instituted this action. The presently material facts, as set forth in petitioner's amended complaint (R. 5-26), are as follows:

On or about June 27, 1945, petitioner was called before an Army Inspector General and examined concerning the transactions for which he was later to be tried by court-martial (R. 6). On the same day, petitioner discussed these matters with a fellow officer, one Major Taylor, who was an attorney

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[3] The Under Secretary, while approving the sentence, approved only the court-martial's finding that petitioner had unlawfully converted 30,000 Reichsmarks (R. 21-22).

[4] The record does not show precisely when petitioner was released or when this suit was commenced. The record does show, however, that the sentence was approved by the Under Secretary on October 8, 1946 (R. 18-22), that petitioner's dismissal from the service was effective October 18, 1946 (R. 22), and that the motion for leave to file an amended complaint in the present action was filed on May 6, 1948 (R. 1).

and from whom petitioner sought legal advice (R. 9). On June 29, 1945, charges and specifications were prepared and signed (R. 11, 22-26). On the following day Major Taylor was appointed Investigating Officer to conduct the inquiry required by Article of War 70 [5] (*supra*, p. 2) before referral of charges for trial by court-martial (R. 10). Petitioner requested a continuance of the investigation in order to call witnesses on his behalf, but his request was refused, the Investigating Officer explaining that the Eighth Corps was about to be deactivated and that he had been ordered to complete his investigation promptly (R. 10).

For some months after the investigation, petitioner heard nothing further about the charges against him (R. 11). On December 27, 1945, he was granted 84 days of terminal leave pursuant to orders which provided that he would revert to inactive status on March 23, 1946, at the end of his leave (R. 14-15). On January 30, 1946, petitioner was recalled from terminal leave and transported to Heidelberg, Germany, to stand trial (R. 7, 18). The charges and specifications upon which he was tried had been re-drafted on September 8, 1945 (R. 12), but alleged essentially the same facts and invoked the same Articles of War as had those preferred on June 29, 1945 (compare R. 18-20 with R. 23-25).

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[5] References herein to AW 70 refer to that Article as it existed at the time of the events involved in this case. See note 2, *supra*.

In his complaint in the present action, petitioner asserted that the court-martial which convicted him had lacked jurisdiction for the following reasons:

1. The order placing him on terminal leave prevented his subsequent recall and trial (R. 7).[6]

2. The requirements of Article of War 70 had been violated in that (a) the officer he had "retained" for legal advice served as Investigating Officer; (b) his request for a continuance of the investigation was denied; (c) the Investigating Officer refused to call petitioner's witnesses or take their depositions; (d) petitioner was denied an opportunity at the investigation to cross-examine the witnesses against him; (e) eight months were permitted to elapse between the investigation and the trial, resulting in loss of witnesses for the defense; (f) the trial was based on charges and specifications drafted on September 8, 1945, as to which no new investigation had been conducted (R. 9-12); (g) petitioner had "had no opportunity to prepare his case for trial" (R. 13).

For these reasons, petitioner prayed for a judgment or decree setting aside the Under Secretary's order which approved the conviction and sentence and ordering the defendant, General Wit-

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[6] This contention has been abandoned in the petition for certiorari. Cf. *Hironimus* v. *Durant*, 168 F. 2d 288 (C. A. 4), certiorari denied, 335 U.S. 818.

sell, to reform petitioner's military records accordingly (R. 13).

The respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted, arguing, *inter alia,* that there was no jurisdiction to review a court-martial order in this type of proceeding and that petitioner's complaint was, in any event, without merit (R. 27-46). Holding that it was without power to hear what amounted to an appeal from a court-martial conviction, the district court granted the motion to dismiss (R. 96-99, 100).

While petitioner's appeal was pending in the court below, this Court decided *Humphrey* v. *Smith*, 336 U. S. 695, holding that the pre-trial procedure required by Article of War 70 was not "an indispensable prerequisite to exercise of general court-martial jurisdiction" (336 U. S. at 697). Relying upon the authority of that decision, respondents moved for affirmance of the district court's judgment without further briefs or argument (R. 103-106). In a *per curiam* order dated October 13, 1949, this motion was granted (R. 113).

ARGUMENT

Whether, and in what circumstances, one convicted by a court-martial but no longer subject to restraint may seek judicial review of that conviction is a question which need not be answered in

this case (cf. district court opinion, R. 96-99).[7] For this Court's decision in *Humphrey* v. *Smith*, 336 U. S. 695, rendered after the district court's decision in the instant case, all but disposes of petitioner's contentions. Petitioner expressly disclaims (Pet. 16) any objection to "the court-martial proceedings *per se*" and states that his "attack is leveled against the preliminary proceedings * * *." This attack, though variously and insistently formulated (Pet. 2, 7, 8, 16, 24), amounts almost entirely to the assertion that petitioner was denied the "thorough and impartial investigation" required by Article of War 70. But this precise question was raised and disposed of a year ago in *Humphrey* v. *Smith*, which held that a "court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War." 336 U. S. at 701. As petitioner

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[7] It should be noted here that petitioner's suit would appear to be at least premature because of his failure to invoke the military review available to him under Article of War 53 (Act of June 24, 1948, c. 625, Title II, § 230, 62 Stat. 604, 639, 10 U.S.C., 1946 ed., Supp. II, 1525). *McMahan* v. *Hunter*, 179 F. 2d 661 (C.A. 10), petition for certiorari pending, No. 350 Misc.; *Spencer* v. *Hunter*, 177 F. 2d 370 (C.A. 10); *Whelchel* v. *McDonald*, 176 F. 2d 260 (C.A. 5). This Article provides that one in petitioner's position may, within one year after termination of World War II, apply to the Judge Advocate General, who is empowered "to grant a new trial, or to vacate a sentence, * * * and substitute for a dismissal * * * previously executed a form of discharge authorized for administrative issuance * * *."

points out (Pet. 16-17, 21-22), the facts in this case are of course different from those in *Humphrey* v. *Smith*. Petitioner is unable to show, however, that these factual differences make the rule in *Humphrey* v. *Smith* inapplicable here, and he suggests no reason for reconsidering that decision now.

One aspect of petitioner's grievance which may not be directly covered by *Humphrey* v. *Smith* is his contention that he "had no opportunity to prepare his case for trial" (R. 13, Pet. 6, 7, 17). But this contention, even if cognizable by the civil courts after the extended review already accorded by the military authorities (R. 21-22) (cf. *Hiatt* v. *Brown,* 339 U.S. 103), is without factual basis in the present case. Petitioner's allegation (Pet. 6, 15) that he was confronted at his trial with charges about which he had had no previous knowledge is flatly refuted by the record. The charges preferred in June, 1945, were in fact redrafted, but the unlawful transactions alleged were unchanged except in trivial and immaterial respects (for example, the new specifications alleged appropriation of 96,000 rather than 97,000 Reichsmarks). Compare R. 18-20 with R. 23-25.

Equally without substance are petitioner's claims that he had no sufficient opportunity to interview witnesses in his own behalf, that the court-martial should have granted a continuance for

such interviews, and that he had in any event "lost every opportunity to defend himself" when his witnesses were not called at the pre-trial investigation (Pet. 2, 7, 11, 18, 24). Petitioner knew the charges against him on June 30, 1945 (R. 10). During the period of almost eight months between that date and his trial, petitioner was given no basis for supposing that these charges were being dropped (R. 11). Now he presses a groundless protest against this delay,[8] together with the inconsistent complaint that he was tried in undue haste. The important point here is that there is not the slightest basis in the record for the conclusion that petitioner lacked more than ample time to take depositions and gather whatever evidence he needed. As he points out (Pet. 15), he did not return to the United States until December, 1945. He does not assert that he did anything during the

[8] Petitioner suggests no basis either in the Articles of War or in constitutional law for the contention (Pet. 7, 17, 24) that the court-martial was without jurisdiction because of the delay of nearly eight months between the preferring of the original charges and his trial. So far as this argument may be addressed to Article of War 70, it should be noted that this Article provided only that when a "person subject to military law *is placed in arrest or confinement,* immediate steps will be taken to try the person accused or to dismiss the charge and release him." (Italics added). It may be noted, in addition, that Article of War 39 provided at the time of petitioner's trial (Act of June 4, 1920, c. 227, subch. II, § 1, Art. 39, 41 Stat. 759, 794, 10 U.S.C., 1946 ed., 1510), and still provides, for a two-year limitation period upon prosecutions for the type of offense involved here. There is, in short, no constitutional or statutory limitation upon either military or civil prosecutions which would warrant nullifying petitioner's conviction on the ground of such pre-trial delay as occurred in this case.

six months preceding his return or during his month of terminal leave thereafter, to protect himself against the alleged loss (R. 11) and inaccessibility (Pet. 6) of his claimed witnesses. Having been allowed the five days for preparation required by Article of War 70 (in time of peace) even after his return to Germany for trial (Pet. 18), petitioner has no basis for his contention that due process required further delay in the circumstances of this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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